

November 22, 2000

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Ms. Magalie Roman Salas  
Secretary, Federal Communications Commission  
445 12<sup>th</sup> St. S.W.  
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Certificate of Service; MM Docket 86-440  
Dear Ms. Salas:

The Givens & Bell division of Blue Ridge Video Services hereby submits the enclosed Appeal, dated November 22, 2000. We certify that we are mailing true copies to the following interested parties:

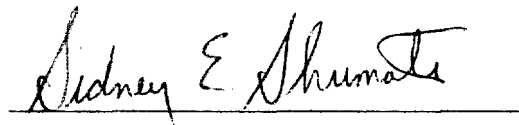
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Sidney E. Shumate  
Principal Owner  
Givens & Bell Division  
Blue Ridge Video Services

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re: Applications of	)	MM Docket No. 86-440
	)	
Achenar Broadcasting Company	)	File No. BPCT-860410KP
And	)	
Lindsay Television, Inc.	)	File No. BPCT-860410KQ
And	)	
The Givens & Bell Division of	)	File No. BPCT-961023KF
Blue Ridge Video Systems	)	
And	)	
The Petition of Givens & Bell	)	Submitted March 13, 2000
for Rule Making Seeking a New	)	
Channel As per Public Notice	)	
DA 99-2605	)	

For Construction Permit for a new Television Station on Channel 64, Charlottesville,  
Virginia

November 23, 2000

To: The Commission

**APPEAL**

**Introduction:**

On October 25, 2000, the Federal Communications Commission (the Commission) released an Order, FCC 00-382, dismissing on procedural grounds a pleading filed May 26, 2000 by Givens & Bell, a division of Blue Ridge Video Services (Givens & Bell), objecting to the Commission's grant on Motion of the Commission, of a construction permit to the combined forces of Achenar Broadcasting Company (Achenar) and Lindsay Television Inc. (Lindsay), operating as the Charlottesville Broadcasting Corporation (CBC of DC), a corporation chartered in the District of Columbia.

The Commission, by this Order terminates the right of Givens & Bell to participate as a party to the hearing proceeding in MM Docket No. 86-440. Givens and Bell hereby submits, as per it's right under 1.301(1), its Appeal to this Order.

Givens and Bell appeals this Order on the following basis:

1. A. The Commission has inappropriately and arbitrarily waived an inordinate number of it's own rules, regulations, and guidelines in this proceeding in order to attempt to bring closure to the longest current comparative hearing. By not justifying and reaffirming it's earlier decision to dismiss the applications of Achenar and Lindsay, the Commission has left itself open to the completion of a fraud perpetrated upon it by Achenar Broadcasting Company in order to obtain at least partial ownership of a construction permit to build a television station at Charlottesville, Virginia.
2. B. The Commission has waited too long, and not long enough, to dismiss the Givens & Bell application on the procedural grounds it attempts to use. As a result of subsequent Congressional action and FCC decisions pursuant to that action stated in it's First Report and Order, both the application of Givens & Bell and it's accompanying freeze area waiver must be fully considered. Also, the Commission has also committed a procedural error by not giving full consideration to the accompanying waiver before dismissing the Givens & Bell application.
3. C. At the time Achenar and Lindsay submitted modified construction permits to the Commission, under Commission rules, the Commission should have placed the

applications of Achenar and Lindsay in order for consideration behind the application of Givens and Bell.

4. D. The Commission errs in it's claim that the Givens & Bell application must be dismissed because the Achenar and Lindsay applications were "pending".

### **The Appeal:**

5. A. The Commission has inappropriately and arbitrarily waived an inordinate number of it's own rules, regulations, precedents and guidelines in this proceeding in order to attempt to bring closure to the longest current comparative hearing. By not justifying and reaffirming it's earlier decision to dismiss the applications of Achenar and Lindsay, the Commission has left itself open to the completion of a fraud perpetrated upon it by Achenar (with the auction-threat coerced co-operation of Lindsay) in order to obtain at least partial ownership of a construction permit to build a television station at Charlottesville, Virginia.

6. The nearly-identical modified construction permits of Achenar and Lindsay, (of which the Lindsay application was dismissed and the Achenar application approved by the Commission on motion of the Commission) exhibit a surprising, significant, and curious lack of engineering competence, especially in light of the long history of this proceeding and the multiple applications previously submitted. The Enforcement Bureau summarized the situation<sup>1</sup> as : "the proposed use of an antenna that cannot be mounted on the specified tower at the place specified, both because it is physically impossible and because a site user will not give its permission to modify the tower, and the applicants' failure to verify that they have permission from the new tower owner to use the proposed

antenna site.” In addition, Givens & Bell made a showing that the positioning of the CBC of DC main antenna on the support structure, made necessary by the side-mount-only design antenna specified in the application, would create pattern distortion echoes from the support structure that would negate the planned null in the antenna pattern intended to protect the NRAO facility at Green Bank, West Virginia. The lack of correcting and updating of these applications by the applicants demonstrates a complete lack of candor on the part of the applicants regarding availability of the proposed tower, location of their antenna thereon, and an attempt to hide or ignore the faulty engineering.

7. It is not unusual for applicants, especially competing applicants under time pressure, to put forth a “place-holding” engineering application, intending to modify it after winning the comparative hearing, or, more recently, auction. This should not be the case here. The two, now combined applicants, Achenar and Lindsay, had several years to prepare, and obviously co-operated to prepare their obviously identical applications. The engineering and other details, such as securing a usable tower site, should have been perfect or nearly-so, especially as they had ample opportunity to plagiarize the engineering and precedent-based solution to the protection of the NRAO facility at Green Bank first presented and on file in the Givens & Bell application, even to relocating to the same tower (but not the same location on the tower) as specified in the Givens & Bell application. Why would such an application contain such glaring mistakes? Givens & Bell proposes that the answer, given a study of the history of the engineering applications submitted by both Achenar and Lindsay during the early years of this proceeding, is that the application is intentionally faulty.

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<sup>1</sup>See “Enforcement Bureau’s Opposition” filed June 14, 2000.

8. Once the grant was finalized, CBC of VA would be free to immediately return to the Commission to apply for what is now considered a minor change in the construction permit. Finalizing of the grant would essentially eliminate any further chance for opposition by Shennandoah Broadcasting, owner of the Channel 19 translator, or Givens & Bell, to protest this change. If CBC of DC were to apply for a location or re-location nearby, and outside of the NRAO "Quiet Zone", they would not trip the requirement to notify the NRAO of the change. Even if the NRAO learned of the application separately and protested, CBC could counter-protest that they are outside of the "Quiet Zone". Since no one will be left who can raise the question (Achenar having now successfully completed it's campaign to use the issue to obtain, albeit only half, ownership of the construction permit), and based upon the precedent that the NRAO rarely protests construction outside of the "Quiet Zone" unless a third party raises the question, the modified application could easily eliminate any protection from the new Ch. 19 transmitting station toward the NRAO operation at Green Bank.

9. Granting such an application would become a complete embarrassment to the Commission, as it would constitute the successful completion of a fraudulent use of the issue of protection of the NRAO installation at Green Bank, West Virginia, to attempt to obtain ownership of a construction permit for a television station at Charlottesville, Virginia, executed by an entity (Achenar) composed of primarily Washington-DC based communications lawyers proceeding on their own behalf. It is Givens & Bell's opinion that Lindsay joined with Achenar only to avoid having the proceeding settled at auction.

10. The Commission has attempted to avoid having to consider these matters by "killing the messenger", i.e. by instantly dismissing the application of Givens & Bell and

declaring that Givens & Bell has no standing in this proceeding. The Commission, however, has not followed the procedural practices it stated it would follow in such cases<sup>2</sup>. In paragraph 99 of its First Report and Order, the Commission stated that in regards to the remaining comparative hearing cases: “To the extent that there are unresolved site or financial issues in these resumed hearing proceedings, or such issues are requested in a new petition to enlarge issues, we will resolve such issues (or add such issues if a substantial and material question of fact is raised) only to the extent that they involve a question of false certification.” It goes on to state, with regards to auctions as well as the remaining comparative hearings: “Candor, however, continues to concern the Commission whether it awards the broadcast construction permits through the comparative hearing process or through a system of competitive bidding. Issues relating to whether the winning bidder falsely certified reasonable assurance of its site availability or financial qualifications must therefore be resolved before we can grant a construction permit to the winning bidder”.

11. Therefore, the Commission has already stated, prior to the objections of Givens & Bell, that it would resolve such issues. We therefore request that the Review Board remand this proceeding to the Commission for its full re-consideration, regardless of the status of the Givens & Bell application subsequent to this appeal.

12. B. The Commission has waited both too long, and not long enough, to dismiss the Givens & Bell application on the procedural grounds it attempts to use. First, as to not long enough; the Commission has committed a procedural error: under

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<sup>2</sup> See Paragraph 99 of First Report and Order In the Matter of Implementation of Section 309(j) of the Communications Act; FCC 98-194, Adopted August 6, 1998, Released August 18, 1998.

73.3566(a), the Givens & Bell application can not be considered defective until full consideration has been given to the accompanying waiver. This application is still awaiting consideration of the accompanying waiver under the proceeding initiated by Public Notice DA 99-2605.

13. As to “too long”: As a result of subsequent Congressional action in the Budget Bill of 1997<sup>3</sup>, and the incorporated modification of section 309(j) and the addition of 309(l) of the Communications Act of 1934, the application of Givens & Bell qualifies as one of the “application for construction permit for commercial radio or television stations that were filed with the Commission before July 1, 1997”<sup>4</sup>. Having passed the completeness check and having been assigned a file number, and having been “on file” as of July 1, 1997, the application of Givens & Bell qualifies under the strict interpretation of section 3002 of the Budget Bill of 1997 accepted by the Commission in the First Report and Order<sup>5</sup>, and is therefore, an eligible bidder. Quoting in part from paragraphs 67 and 68 of the First Report and Order, (para. 67) “We conclude that the pending applications with waiver requests constitute “applications..filed with the Commission before July 1, 1997” within the meaning of Section 309(l). We discern no distinction in the statutory language, or in the accompanying legislative history, between applications filed with waiver requests and applications submitted without waiver requests. (para. 68) We disagree that these applications are beyond the scope of Section 309(l) because no file number was assigned, no public notice was issued, and no cut-off list was published. We believe we have no choice under

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<sup>3</sup> Public Law 105-33, August 5, 1997 Balanced Budget Act of 1997, Section 3002(a)(3), Resolution of Comparative Licensing Cases.

<sup>4</sup> 47 U.S.C. 309(l) as added by Public Law 105-33.



the statute. The language of paragraph (2) is unambiguous that, where competing applications were filed with the Commission before July 1, 1997, “the Commission shall...treat the persons filing such applications as the only persons eligible to be qualified bidders.” Therefore, under the strict interpretation of the statute accepted by the Commission, the waiver request of Givens & Bell must be given full consideration under the procedures outlined in DA 99-2605 before any grant of a construction permit may be made; and if the waiver request is approved, and the updated application allowed by DA 99-2605 changing Givens & Bell’s requested channel from 64 to 19 is accepted, then Givens & Bell must be considered eligible as a “qualified bidder” for the Ch. 19 allotment at Charlottesville, Virginia.

14. The clear intent of the authors of section 3002 of the Budget Bill of 1997, made clearer by the Conference notes, is that all current applicants on file as of July 1, 1997 were to be processed and given the opportunity to bid at auction (or to cut a deal and combine to avoid going to auction), thereby terminating the endless litigation represented by this appeal.
15. C. With respect to the status of the respective Achenar, Lindsay, and Givens & Bell applications:
16. (1) both the Lindsay application and the Achenar application in question had been dismissed at the time that the Givens & Bell application was submitted, and all appeals before the Commission had been exhausted.

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<sup>5</sup> First Report and Order, August 6, 1998 Adopted August 18, 1998, “Implementation of Section 309(j) of the Communications Act, paragraphs 66; Pending Applications With Waiver Requests of the Freeze on Television Applications, continuing in paragraphs 67 and 68.

17. (2) Prior to ordering the dismissal of the Givens & Bell application, in its Memorandum Opinion and Order of April 19, 2000<sup>6</sup>, the Commission upheld its original decision<sup>7</sup> by dismissing the application of Lindsay without protest, leaving only the modified, non-original application of Achenar to be considered.
18. (3) Achenar has sought three times to modify its application<sup>8</sup>. In the first modification submitted by Achenar, a "Petition for Leave to Amend and for Waiver of Short Spacing Rule" filed on November 19, 1997, Achenar sought to modify its application in order to provide protection to the NRAO.
19. Lindsay also sought to modify its application prior to Achenar, with a "Petition for Leave to Amend Application" filed on September 19, 1997, with an engineering exhibit essentially identical (except for the name of the applicant thereon) to the Achenar application.
20. The above two modification applications were required to meet the tests specified in 73.3522(b), as it read in 1977: "In the case of requests to amend the engineering proposal (other than to make changes with respect to the type of equipment specified), good cause will have been shown only if, in addition to the usual good cause consideration, it is demonstrated: (i) The amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g. notification of a new foreign station or loss of transmitter site by condemnation); and (ii) The amendment does not require an enlargement of issues or the addition of new parties to the

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<sup>6</sup> Paragraph 28, Memorandum Opinion and Order, FCC 00-149, MM Docket 86-440, Adopted April 19, 2000 Released April 28, 2000.

<sup>7</sup> FCC 91-280, September 19, 1991.

<sup>8</sup> Achenar has filed the following with regards to BPCT-860410KP: Petition for Leave to Amend and for Waiver of Short Spacing Rule, filed November 19, 1997; Joint Petition for Approval of Settlement Agreement, for Leave to Amend Application, and for Immediate Grant of Construction Permit filed

proceeding.” The Achenar and Lindsay applications do not satisfy either test (i) or (ii) above.

21. As per 73.3522(b)(2)(c), as it existed in 1997, (and still in force today as 73.3522 (b)(2)(iii)), “a petition for leave to amend may be granted, provided it is requested that the application as amended be removed from the hearing docket and returned to the processing line. See Sec. 73.3571.” In 73.3571 as it existed in 1997, it states: “(h) When a application which has been designated for hearing has been removed from the hearing docket, the application will be returned to its proper position (as determined by the file number) in the processing line. Whether or not a new file number will be assigned will be determined pursuant to paragraph (i) of this section, after the application has been removed from the hearing docket. (i)(1) A new file number will be assigned to an application for a new station, ...., when it is amended to ....change station location. Any other amendment modifying the engineering proposal, except an amendment regarding the type of equipment specified, will also result in the assignment of a new file number unless such amendment is accompanied by a complete engineering study showing that the amendment would not involve new or increased interference problems with existing stations or other applications pending at the time the amendment is filed.”
22. Therefore, the Achenar application should have been assigned a new, more recent file number and have lost its “filing priority”<sup>9</sup>, and have been placed in order for consideration behind the Givens & Bell application, negating it’s “pending status”

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January 30, 1998; Supplement to Joint Petition for Approval of Settlement Agreement, for Leave to Amend Application, and for Immediate Grant of Construction Permit, filed June 24, 1998.

<sup>9</sup> See 73.3522(a)(6) as it existed in 1997.

protection against Givens & Bell. The Commission's rules in 1997, as now, do not allow accepting major modifications to applications (such as to add protection to the NRAO) without requiring that the applicants "step to the back of the processing line". By having a new file number assigned and being relocated in the "processing line", the 1997 Achenar and Lindsay applications should have also been made subject to the requirement to request a "freeze area" waiver.

23. D. The Commission attempts to dismiss the application of Givens & Bell on the basis of the Achenar and Lindsay applications being "pending"; however, the Commission is incorrect in its claim that the Givens & Bell application must be dismissed because the Achenar and Lindsay applications were "pending". This was not the main issue, only a first issue to be addressed, as the Commission records showed the applications status as not "pending", but "indeterminate".

24. The Givens & and Bell application cannot be dismissed solely on the basis of the Achenar and Lindsay applications being "pending"; there is no requirement in the Commission's rules preventing the Commission from receiving for consideration a competing application once the original applications have been dismissed before the Commission, even if the original application or applications are "pending" before an exterior court. If such a rule existed, the Commission would be prevented from accepting a competing application that offered a unique and effective solution to the problem which caused the dismissal of the prior applicants. This was not addressed in the Commission's Order dismissing the Givens & Bell application; therefore, the Commission's argument for dismissal was incomplete. Instead, the Commission

again<sup>10</sup> relies on a vague and extremely weak “reading together” of several sections of the Commission’s rules. Since the vague “reading together” is undefined, we must discuss the rules individually as they apply to this situation. Of the stated rules, section 73.3564(a) refers to the procedure for accepting applications, a procedure which the Givens & Bell application has already successfully passed through, including being temporarily returned and corrected and then re-submitted, at which time it was assigned a file number and placed on a “submitted for filing” status due to it’s being accompanied by a waiver request. 73.3564(b) does not yet apply, since under 73.3566(a) the waiver accompanying the Givens & Bell application has not yet been processed and considered under the procedures established by Public Notice DA 99-2605 (as discussed in paragraph 12 above). And with respect to the Givens and Bell application, 73.3564(c) is superseded by the procedures of Public Notice DA 99-2605.

25. Under 73.3572, had the Commission followed the procedures required by 73.3571, as discussed starting in paragraph 18 above, the Achenar application should not have been either processed or granted until the Givens & Bell waiver and application had been processed as per Public Notice DA 99-2605. Therefore, taken rule-by-rule, we again state that the Givens & Bell application is in compliance with these rules.

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<sup>10</sup> See footnote 4 of FCC 00-382.

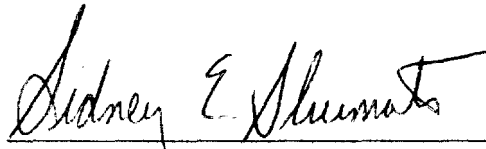
**Summary:**

26. The Commission has, in the waning days of the Clinton administration, attempted to “resolve one of the oldest comparative proceedings involving competing broadcast applications filed before July 1, 1997.” Unfortunately, in doing this, it has unwisely run roughshod over its own rules and overturned its earlier decision to dismiss both the Achenar and Lindsay applications.
27. By not defending before the Court its earlier decision to dismiss the Achenar and Lindsay applications, utilizing the existence of the combination engineering-and-precedent-based solution first presented in the Givens & Bell application, by allowing Achenar and Lindsay to incompetently plagiarize the same solution in their own engineering modification applications, and by accepting the Achenar modification application in violation of its own rules and modifying it further on Order of the Commission, the Commission has not brought closure to the matter, it has simply opened the door for Achenar to take the final step in defrauding the Commission and the U. S. Court of Appeals, and victimizing Lindsay.
28. By not defending its earlier decision and dismissing Achenar and Lindsay, the Commission created a Catch-22 situation. The Givens & Bell waiver and application, was prepared and submitted in the expectation that the Commission would successfully defend its earlier decision, and with the understanding, verified by the Commission, that no active application was being recognized by the Commission as active for the Ch. 64 allotment at Charlottesville at the time that the Givens & Bell application was tendered. Having passed the initial completeness check, it was protected against dismissal by the existence of the accompanying waiver; had the

Achenar and Lindsay applications been finally dismissed, the Givens & Bell application would have proceeded to be processed as a “freeze waiver” applicant.

29. The Commission continued to ignore the Givens & Bell application, and to promote the combination of Achenar and Lindsay, waiving or ignoring each Commission rule and protest along the way, including the rule that would have placed the Achenar and Lindsay modified applications behind the Givens & Bell application in priority.
30. The passage of section 3003 of the Budget Bill of 1997 terminated the opportunity of the Commission to dismiss the Givens & Bell application, in that its clear intent is that all applications on file as of July 1, 1997, and only those applications, were to be eligible to bid, at auction, for the allotment they had applied for, therefore terminating the comparative hearing process and it’s endless litigation.
31. For the Commission to dismiss the Givens and Bell application, and grant on its own Motion, the modified CBC of DC application, a direct, unsupported reversal of it’s earlier decision to dismiss both the Achenar and Lindsay applications, is in violation of both it’s own rules and the requirements of Public Law, the Budget Bill of 1997.
32. Givens and Bell requests that the grant of the CBC of DC construction permit be permanently stayed; and that the CBC of DC application be remanded to the Commission for further engineering study and to resolve the issue of a lack of Candor regarding the availability of the proposed transmitter site.
33. Givens & Bell also requests the immediate reinstatement of the Givens & Bell application and it’s accompanying waiver request.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sidney E. Shumate". The signature is written in dark ink and is positioned above a horizontal line.

Sidney E. Shumate, Principal Owner, Givens & Bell

Date: 11/22/2000